PP

v.

HATIB GUMBALI IMAM BAKIRI

HIGH COURT SABAH & SARAWAK, TAWAU
RICHARD MALANJUM J
[CRIMINAL TRIAL NO: T45-02-2001]
28 FEBRUARY 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in methamphetamine - Ingredients - Accused having key to car in which drug was found - Whether amounted to proof of possession - Failure to call Store Keeper who kept drug exhibit - Whether chain of evidence broken*

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Trafficking in methamphetamine - Discrepancies in evidence of material witnesses - Store Keeper not examined - Weight of drug not determined through scale but by way of formulated calculations - Whether no prima facie case made out - Whether no case to answer - Dangerous Drugs Act 1952, s. 39B(1)(a)*

The accused was charged with trafficking in 75.92 grams of methamphetamine under s. 39B(1)(a) Dangerous Drugs Act 1952. In the court, at the close of the prosecution's case, the prosecution led evidence which showed that: (i) the drug in question was discovered in a car; (ii) the accused was in possession of the key to the car; (iii) the car belonged to one Idjal, who lent the car to his brother but otherwise did not know how the car came to be associated with the accused; (iv) the drug was confirmed by the chemist ('PW1') to be methamphetamine weighing 75.92 grams; and (v) before and after the drug was sent for analysis, the same had always been kept by the police in their Exhibit Store. The facts showed, however, that, PW1 only took about 4 grams of the drug as samples for his analysis, and that he had obtained the nett-weight of the drug not by way of using the scale but by applying a certain formulated calculation which he described as "percentage of purity divided by the value of 100 and multiplied by the respective weights of the crystal-like substances". This aside, the prosecution had not examined the Exhibit Store Keeper and nor had the witness been offered to the defence. Upon the evidence, and the set of circumstances, a question arose as to whether a *prima facie* case of trafficking had been made out against the accused.

Held:

[1] There were obvious discrepancies between the evidence of PW3 and PW4 on material points in relation to the issue of possession. Inter alia, these witnesses contradicted each other in their respective versions as to whether the accused was holding the key when the police party was heading towards the car, as to whether it was the accused who opened the car, as to whether it was the accused who took out the package found inside the car and as to whether the accused was, at the material time, handcuffed. Neither of their testimonies could thus be relied upon without question, and it therefore follows that the element of possession has not been sufficiently established by the prosecution. (pp 801 f-h & 802 a-e)

[2] PW9 had said that he had given the drug exhibit to the Police Exhibit Store Keeper before taking it to the chemist, PW1. Unfortunately, no effort was made by the prosecution to call the Store Keeper to clarify on the accessibility of the store by others. Whilst there is no necessity to call each and every person that might have handled an exhibit, in this case the evidence of the Store Keeper is crucial in view of the evidence of PW9. Hence, what happened to the exhibit after the same was handed over to the Store Keeper by PW9 was anyone's guess. To make matters worse, the prosecution has also failed to offer the Store Keeper as a witness to the defence. (pp 803 h & 804 a)

[3] PW1 did not inform the court as to whether the formula that he used to obtain the weight of the drug was the accepted formula to determine the weight of drug such as methamphetamine. Moreover, there was no indication that the crystal-like substance was uniformly homogenous whereby the 12 samples taken were true representatives of the substance. Hence there was doubt whether the samples taken were from a uniformly homogenous material. The court is also left with serious doubt as to the purported weight of methamphetamine stated in the charge. (pp 804 h & 805 a)

[4] PW1 did not take 50 grams or more of the drug for his analysis. Bearing in mind the cases of *PP v. Alex bin Muharram & Anor* and *Loo Kia Meng v. PP*, the adequate quantity test or the minimum 10% requirement has clearly not been satisfied. Consequently, no *prima facie* case of trafficking has been established against the accused. (p 805 c)

[Accused acquitted and discharged without defence being called.]

Case(s) referred to:
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
PP v. Alex Muharram & Adzman Muadjin (Criminal Trial No: K47-02 & 03-1999) (unreported) ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180
Dangerous Drugs Act 1952, ss. 37(da), (xvi), 39B(1)(a)
Evidence Act 1950, s. 27

For the prosecution - Norliza Yusof DPP
For the accused - En Liew; M/s CC Liew & Co

Reported by WA Sharif

JUDGMENT

Richard Malanjum J:
On 26 February 2002 I acquitted the accused on a charge under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) without calling the defence. In so doing I indicated briefly that it was my ruling based on the evidence adduced at the end of the prosecution's case that the prosecution failed to sufficiently establish on *prima facie* basis that the accused was in possession of the drug in question at the material time. I also found that there was a break in the chain of evidence in relation to the keeping of the drug seized in that the Police Exhibit Store Keeper was only identified but not called as a witness pertaining to the condition of the Exhibit Store, in particular on its accessibility by other persons. Nor was there any evidence from the Investigation Officer as to the condition of the drug exhibit when it was taken from the Exhibit Store. In fact there was no evidence as to how the drug exhibit was handled to and from the Exhibit Store. Further the Police Exhibit Store Keeper was never offered to the defence at the end of the prosecution's case. And finally I also touched on the issue as to the weight of the drug exhibit and the manner such weight was obtained as stated in the charge preferred against the accused. In concluding my *ex-tempore* ruling I stated that I would give my reasons in the event of further appeal. As there is now an appeal by the prosecution these are therefore my reasons.

The charge preferred against the accused reads as follows:

> That you, HATIB GUMBALI BIN IMAM BAKIRI, are charged at the instance of Public Prosecutor, Malaysia and the charge against you is as follows:

> That you, on the 3rd day of June 2000 at about 8.30 p.m., in front of Hotel Permaisaba, in the District of Lahad Datu, in the State of Sabah, on your own behalf, did traffic in a dangerous drug, to witness 75.92 grammes of Methamphetamine, and that you have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act, 1952 (Revised 1980) and punishable under Section 39B(2) of the same Act.

The accused pleaded not guilty and the prosecution therefore proceeded with the trial by calling 9 witnesses. At the close of the prosecution's case the defence submitted that there was no case for the accused to answer. The learned Deputy Public Prosecutor said otherwise.

It is the evidence of PW3 Chief Inspector Balamurugan a/l Govinden that on 3 June 2000 at around 8.30pm he received a telephone call from a member of the public informing him that there was a person of Suluk race staying at the Permai Sabah Hotel, Lahad Datu, Sabah who had with him about one kilogram of drug locally known as syabu. PW3 said that he proceeded to call Sergeant Redzuan to gather as many as possible Police personnel at the Pondok Polis, Jalan Teratai, Lahad Datu. At about 9pm PW3 said that he met four Police personnel in the persons of Sergeant Redzuan, Constable Reginald, Constable Yakub and Lance-Corporal Jenelee. He briefed them of the task ahead before proceeding to Hotel Permai Sabah.

On arrival at the hotel PW3 said that he went to examine the Register Book of the hotel looking for the name of Haji Gumbali that was given to him earlier on. He did not find such a name. However he was not satisfied with the search. So he went on to check from page to page of the Register Book. He came across a name of 'Molpi' that he found strange and definitely of Suluk race. He suspected the name could be a disguise. So he and his group went to the room number 138 that was occupied by the said 'Molpi' at the first floor of the hotel.

PW3 went on to say that when he reached at the door of the room he knocked the door but it was not opened. He waited for a while before the door was opened by a man. He then introduced himself and informed the man that he was there to search the room. He asked for cooperation from the man.

According to PW3 he noted that in the beginning the man was shocked but later on allowed the room to be searched. While PW3 and his men were doing the search the man sat on the bed. There was no other person in the room. The search ended with nothing found and he issued Borang Polis 47 – a search list (exh. P17) and asked the man to sign.

It was also the evidence of PW3 that while he was doing the search he noticed a key on the lamp table. He asked the man about the key who initially grumbled. He asked again and the man replied that he had a car. He asked where the car was and the man told him that it was parked in front of the hotel. After several minutes PW3 left the room together with his men.

On the way down PW3 said that he was not satisfied with the search and he thought of the car. So he asked his men to go back to the room to get the key and the man. They came back without the key or the man. PW3 said that he then went back to the room and asked the man about the key. The man denied any knowledge of the key. That prompted PW3 to order his men to search the room. Finally Constable Reginald found the key inside a hole behind the door. Thereafter PW3 testified that he interrogated the man and he was given certain information.

PW3 said that he then brought the man together with the key to the ground floor of the hotel. On arrival at the lobby he asked the man what was inside the car and the man replied. According to PW3 the man then brought him and his team to the car that was parked in front of the hotel. On reaching the car PW3 said that the man opened the left front door of the car. Then the man entered the car, lifted up the rug and took out a yellow envelope. From inside the envelope the man took out two packets that contained white crystal-like substance that was suspected to be drug locally known as syabu. PW3 also said that inside the envelope there were also two rolls of either film or negatives but he could not remember which one.

It was also the evidence of PW3 that when the man came down from the room he had with him a sum of money, a handphone and the key in both hands. And on arrival at the car PW3 said that the man opened the car himself using the key. PW3 also said that he seized from the man one identity card bearing the name of Mohd. Shukor bin Abdul Mumin.

After seizing the things found inside the car PW3 said that he took both the man and the things seized to the Balai Polis Lahad Datu. On arrival he lodged a police report (exh. P24). After that he surrendered the man and the things seized to one Chief Inspector Akhirudin. PW3 also identified the man he surrendered to Chief Inspector Akhirudin as the accused.

Under cross-examination PW3 admitted that he did not know if the accused was sleeping when he first knocked at the door. And when he was referred to the search list PW3 was definite that the money and the handphone were listed therein. He also denied that the money, the handphone and the key were with the police and not with the accused when they were on their way to the car.

But he was not sure if the accused was handcuffed at the lobby of the hotel before going to the car. PW3 also claimed to have no knowledge of whether or not the car belonged to the accused or that he knew how to drive a car.

In re-examination PW3 changed his statement by saying that since there was nothing found inside the room the search list was left blank.

In answer to questions from the court PW3 said that he spoke in simple Malay to the accused. He said that the accused understood him. And he did not ask the accused who was the owner of the car or for his driving licence. As to the opening of the car PW3 maintained that it was the accused who opened it but he said that he did not actually see the accused opening the car with the key.

The next crucial witness called by the prosecution was PW4 Constable Reginald Samsik. In his evidence PW4 said that it was around 8.30pm on 3 June 2000 that he was told to go to the Pondok Polis Lahad Datu. He was then at the Balai Lama Polis at that time. At the Pondok he met PW3, Sergeant Redzuan, Lance Corporal Jenelee and Lance Corporal Yakub. They were given briefing by PW3 who told them that he was going to bring them to Hotel Permai Sabah.

At about 9.30pm they arrived at the said hotel and according to PW4 he saw PW3 making a check on the guests' register book of the hotel. PW4 also said that he saw PW3 asking the receptionist of the hotel though he did not know what it was about. Later on PW3 led them to the first floor of the hotel to room number 138. At the door PW3 knocked and after about two to three minutes later the door was opened and PW4 saw only one occupant. According to PW4, PW3 introduced himself to the occupant of the room while the other police personnel waited for instruction. PW4 said that PW3 subsequently ordered them to search the room. PW4 also said that he noticed that the occupant had no luggage. But he saw a key on the lamp table inside the room. As nothing was found PW4 said that PW3 led them out of the room. On their way down PW4 said that PW3 thought of something and led them back to the room. On arrival PW4 saw that the key that was on the lamp table was no longer there. So PW3 asked them to make a search for the key. Finally PW4 said that he found the key inside a hole of the wall behind the door of the room. He gave the key to PW3 who then led the occupant to go downstairs and headed for a car. PW4 and the rest of the team followed them. On reaching the car PW4 said that PW3 gave the key to the occupant of the room who then opened the car with the key. And after opening the car PW4 said that the occupant pointed to the floor area of the front left seat of the car.

PW4 went on to say that he only saw one envelope which was opened by PW3. At that time PW4 said that he was standing next to the left back door of the car. He saw PW3 taking out only one plastic packet from inside the envelope. Other than that PW4 also saw strips of negatives but he could not identify them in court. Thereafter PW4 said that PW3 led them back to the Balai Polis bringing along with them the occupant of the room who PW4 identified in court as the accused.

When cross-examined by the defence counsel PW4 maintained that they went up to the room of the accused twice although he could not remember who knocked the door during the second visit. As regards the first visit PW4 said that at that time he saw the money and the handphone on the bed of the accused. The accused was counting the money at that time. However they did not take the money during the first visit. But when the accused was taken to the car after the second visit PW4 said that he saw him bringing the money but did not see how he carried it. PW4 also said that he did not see the accused carrying the money and the handphone with his hands as he was behind.

In answer to another question PW4 said that the accused was handcuffed at the lobby of the hotel before being taken to the car where the offending item was found. PW4 also said that it was the accused who pointed to the floor mat of the front left seat of the car after opening the car. And he went on to say that it was the accused who took the envelope from the car using his fingers even though he was handcuffed.

As regards the opening of the envelope PW4 said that when PW3 opened it he was only 2-3 meters from him. PW4 said that he watched as PW3 opened the envelope. According to him PW3 pulled out a packet from the envelope but did not take it out completely. PW4 said that he clearly saw what PW3 did and he saw only one packet although he was not certain how many packets were inside the envelope.

In respect of the trip back to the Balai Polis PW4 said that they all went inside the Proton Wira car of PW3 together with the accused. The car from where the envelope was found was locked and left where it was parked.

In answer to a question from the court PW4 said that he saw the examination of the envelope by PW3 when it was found. According to him he saw PW3 opening the envelope and then pulled out one packet although he did not take it out completely before putting it back inside.

The next witness called who was part of the raiding party was PW8 – Sergeant Redzuan bin Abdullah. However, this witness only mentioned of a man being found in the room and taken to a car and then to the Balai Polis. PW8 was never made to identify who the man was or whether he was in court. Hence I do not think his testimony has any value so far as this case is concerned.

Three witnesses were called by the prosecution in connection with the ownership of the car from where the offending item was allegedly found. PW5 Idjal bin Tahir confirmed that he is the registered owner of the car bearing registration number SL 1205A. He said that in 1997-98 he paid the customs duties for the car to be used in Kota Kinabalu by his elder brother Ahmadul bin Tahir. He had no knowledge of the car being lent to other persons.

Ahmadul bin Tahir – PW6 gave evidence as well. He said that he borrowed the car from his brother since 1997 up to the year 2000. PW6 also said that his older brother by the name of Hajar Tahir used the car as well but did not tell him the purpose. He only came to know that the car was seized by the police when his younger brother was interviewed by the anti-narcotic.

In the evidence of PW7 – Hajar Tahir, he admitted that the car belonged to his brother PW5. And he also said that he used the car to go to work. But on one occasion he went to Brunei and so he asked a friend by the name of Anthony to drive him to the airport. He was in Brunei for two weeks. And when he returned he did not see the car and was told that it was never returned. He went to look for Anthony but failed. According to PW7 he did not know that the car was seized by the police.

PW7 was asked if he knew the accused. He replied that he only knew him casually by the name of 'Haji' since 1980s in Labuan as the accused was then involved in bringing ship to Labuan. PW7 said that he never went out with the accused and he did not know his place of origin. PW7 also said that he never lent the car to the accused.

The prosecution also called the Chemist – PW1 – Encik Shari Desa. This witness testified that he has been a Chemist since 1992. He gave his academic qualification as a holder of Bachelor of Science from Universiti Kebangsaan Malaysia and that he is also a member of the Institute of Chemistry Malaysia.

PW1 gave his experience as a chemist by way of in-house training involving the examination and analysis of exhibits. Since 1997 he did analysis on dangerous drugs such as methamphetamine, cannabis, heroin, 6-monoacetyal morphine and methylenedioxy methamphetamine (MDMA).

As for his experience as a court witness PW1 said that he had given evidence in courts several times. In the High Court the present testimony would be his fifth time while in the lower courts he had given evidence more than twenty times. But he was not told if his evidence were accepted by the court.

According to PW1 he received one yellowish-brown envelope with the marking of 'Urusan Seri Paduka Baginda' from Inspector Akhirudin Mohd Nowani on 16 June 2000 at around 1.43pm. PW1 said that the envelope was sealed with the words 'OCPD Lahad Datu' at the back of it while it was also marked with the letters 'Ex' on it. This witness was also given a Pol. 31 being a request for analysis. On receipt of the envelope PW1 said that he registered it in the Case Registration Computer and the number given by the computer was (KK) FOR 973/00-0. A marker with that number and an official receipt were also generated by the computer. The marker was affixed to the envelope that was received by PW1 while the acknowledgement receipt was handed over to Inspector Akhirudin.

After the process of receiving the envelope was completed PW1 said that he proceeded to put the same inside his steel cabinet that was inside the strong room of the Chemistry Department. PW1 said that he was the only one who had the key to the steel cabinet while his director had the key to the Strong Room.

On 12 August 2000 PW1 said that he began the process of analysing the content of the envelope that was given to him. He opened the envelope and he saw two yellowish-brown envelopes with markings of 'ex. 2' and 'ex. 3' respectively. He also saw at the back of those envelopes affixed thereto seals with the words 'OCPD Lahad Datu'. PW1 proceeded to mark those envelopes with marking of '(KK) FOR 973/00-0' and also signed on them. He then opened those envelopes and he found inside each of them one plastic packet containing white crystal-like substance. In 'ex. 2' he found the plastic packet marked 'A-2' and in 'ex. 3' the plastic packet was marked 'A-3'. He took the weight of the substance found inside those plastic packets using an electronic weighing instrument of 'Satorius' model BPZ21S. According to PW1 he obtained the weight of the substance by way of first weighing the plastic packets individually together with their contents and thereafter only the weight of the plastic packets were taken individually without the contents. The weights of the plastic packets were then subtracted from the gross weights of the substance and the plastic packets in order to get the weights of the substance. In this case PW1 said that for the substance found in 'A-2' the nett-weight was 47.87 grams while for the substance in 'A-3' the nett-weight was 48.54 grams.

After obtaining the weights of the substance PW1 said that he proceeded to homogenise the substances that were found inside the plastic packets by grinding them separately using a grinder instrument of 'Sumeet' brand for about five minutes. Thereafter PW1 carried out the colour test on each of the homogenised substance.

For the colour test PW1 said that there were three kinds, namely the 'Marquis's' test, the Simone's test and the 'Silver Nitrate' test.

In Marquis's test PW1 said that he found the homogenised substances from envelopes marked 'ex. 2' and 'ex. 3' to contain 'amine', an active ingredient found in methamphetamine drug.

And when the Simone's test was carried out on the respective homogenised substances found in the envelopes marked 'ex. 2' and 'ex. 3' PW1 said that he found them to contain methamphetamine.

For the Silver Nitrate test PW1 said that in both the homogenised substances found in 'ex. 2' and 'ex. 3' he found them to contain methamphetamine choride, that is a type of salt found in methamphetamine.

Next, PW1 said that he carried out the confirmation test on the homogenised substances found in the envelopes with markings 'ex. 2' and 'ex. 3' using an instrument called the 'Gaschromatography – Mass Spectrometry (GCMS)' of 'Shimadzu' brand. The result of the test was that both the homogenised substances contained methamphetamine, a type of drug listed in the first schedule of the Act.

The final test that was carried out by PW1 on the homogenised substances found in the envelopes with markings 'ex. 2' and 'ex. 3' was to find out the purity in percentage of the drug. For the homogenised substance in the envelope marked 'ex. 2' PW1 said that he took 12 representative and random samples. He did the same way for the homogenised substance found in envelope marked 'ex. 3'. And using the Gaschromatography (GC) procedure PW1 said that he found the homogenised substance in the envelope marked 'ex. 2' to contain 78.95% purity after deducting 1.08% margin of error. As for the homogenised substance in the envelope marked 'ex. 3' it contained 78.57% purity after deducting 1.08% of margin of error.

As to the nett-weight of the drug methamphetamine found in the envelopes marked 'ex. 2' and 'ex. 3' PW1 concluded that they weighed 37.79 grams and 38.13 grams respectively. These nett-weight were obtained by applying a formula, that is, percentage of purity divided by the value of 100 and multiplied by the respective weights of the crystal-like substances found in the envelopes marked 'ex. 2' and 'ex. 3'.

PW1 went on to say that he prepared a Chemist report on the result of his analysis. That was tendered as an exhibit marked 'exh. P3'. As for the balance of the homogenised substances PW1 said that he put them separately together with their respective original plastic packets into two plastic bags supplied by him and marked with 'Makmal (KK) FOR 973/00-0.' Then these were put inside the envelopes marked 'ex. 2' and 'ex. 3' respectively which in turn were put inside an envelope marked 'ex'. Thereafter PW1 said that he sealed the envelope and at the back affixed thereto his department's seal, namely, Jabatan Kimia Malaysia Cawangan Sabah. Having done all that PW1 then returned the sealed envelope marked 'ex' into the steel cabinet with lock inside the Strong Room of the Department.

On 7 November 2000 at around 9.35am Inspector Akhirudin came to collect the exhibit contained in the envelope marked 'ex' from PW1 together with the Chemist report.

PW1 further testified that the procedures he adopted in doing the tests for the homogenised substances found in the marked envelopes 'ex. 2' and 'ex. 3' were contained in the book entitled 'Recommended methods for testing Amphetamine and Methamphetamine' issued by the United Nations.

Under cross-examination PW1 said that he started his analysis on 12 August 2000 in the early morning. But he could not remember what time he finished. According to him it took three working days for the analysis to complete. He did it himself. PW1 also said that he only recorded the positive results and not the chemical reactions when he was doing the analysis. When asked further this witness said that for the Marquis' test the colour would be orange and rapidly turned to red indicating a positive result. And for Simone's test the colour would change to blue for positive result while for the third colour test it would turn to white precipitate for positive result.

As to the amount of sample that he took for the test PW1 said that from the homogenised substance found inside the envelope marked 'ex. 2' he took 2.53 grams out of 47.87 grams while from the homogenised substance found inside the envelope marked 'ex. 3' he took 1.56 grams out of 48.54 grams.

PW1 was also questioned on the cleaning of the equipment used. According to him it was done by the Pembantu Am Rendah before the commencement of every test.

When learned deputy asked him on the recording of the events during the analysis PW1 said that the important matter to record was only the result and not the chemical reaction.

In answer to questions from the court PW1 said that he did not undergo any kind of formal training in the analysis of methamphetamine. He learnt from his former superior, namely, Encik Khalid Safan. PW1 also disclosed that in September 2000 he followed the proficiency test conducted by Australia. That test involved the testing of drugs methamphetamine and heroin. He passed the test. This witness also said that insofar as he could remember the results of his analysis were never questioned by his superior.

Two other witnesses were called, namely, Constable Nazeri bin Said (PW2) and Chief Inspector Akhirudin bin Mohd. Nowani (PW9). For PW2, he was only responsible in taking the photographs of the Hotel Permai Sabah, the car as well as the items seized as directed by PW9 the investigating officer of this case.

It was the evidence of PW9 that on 4 June 2000 at about 1.45am he was informed by PW3 of an arrest made on one male person suspected of possessing two plastic packets containing crystal-like substance suspected to be drug locally known as syabu. According to this witness PW3 also gave him all the items seized, namely, one yellow envelope, one handphone of Nokia brand, three strips of negatives, one car key and a car, cash of RM6,105 and one identity card. The arrested person was also surrendered to him together with a police report Lahad Datu Report 3057/2000. And PW9 identified the person arrested as the accused. On receiving the accused PW9 said that he called the Sentry to put the accused in the lock-up. As for the items seized he labeled them accordingly.

In respect of the items seized PW9 said that he labeled them, excluding the car, before keeping them inside his cabinet in his room. PW9 described how he did the labeling, namely, by assigning numbers on each of the items and writing those numbers on the envelopes into which he put the items inside respectively. The cabinet according to PW9 was locked using a padlock and that no one other than him had access to it.

This witness was shown each of the exhibits that were tendered by the prosecution and he confirmed that they were those that were surrendered to him by PW3.

In the later part of the day on 4 June 2000 PW9 said that he went to the scene of the incident together with Sergeant Redzuan and Constable Nazri. The latter was instructed to take photographs of the place where the car was parked and Hotel Permai Sabah. He also made a rough sketch plan of the area where the car was parked. On the same day photographs of the items seized were also taken by Constable Nazri on the instruction of PW9.

On 5 June 2000 at about 10am PW9 said that he surrendered the items seized to the Storekeeper of the Exhibit Store. This witness identified the Storekeeper when a person was called into the court. He gave the name of the Storekeeper as Corporal Hamzani bin Hamzah.

PW9 also confirmed that on 16 June 2000 at about 1pm he was at the Chemistry Department Kota Kinabalu to hand over the envelope that had the marking of 'exh' and containing two other envelopes marked 'ex. 2' and 'ex. 3' to PW1. This witness also said that he handed Pol. 31 to PW1 with the request to analyse the items given. And when shown of those items PW9 confirmed they were those that he gave to PW1. He also identified the official receipt issued by the Chemistry Department in relation to those items.

On 7 November 2000 PW9 said that he was at the Chemistry Department collecting the items that were given to PW1 as well as the Chemist Report. After receiving them from PW1 he brought them back to Lahad Datu and put them inside the cabinet in his room and locked it. But on 8 November 2000 at about 9am he took out those items and put them in the Exhibit Store. He also registered the Chemist Report with the Exhibit Store.

As regards his investigation on the occupant of room No. 138 of Hotel Permai Sabah PW9 said that he could not get any information whether one Murphy stayed in the room.

When cross-examined by learned counsel for the accused PW9 disclosed that he did not ask the reception of the hotel regarding the existence of Murphy. But he obtained information that no such person existed. PW9 also said that he was duly informed by his informers that the true name of the accused is as per charge but he had no official document to substantiate that information.

At the end of the prosecution's case the following persons were offered to the defence as witnesses, namely, Lance Corporal Yakub Ibrahim, Lance Corporal Jenelee and ASP Tho Cheng San. It is to be noted that Corporal Hamzani, the Storekeeper was not offered.

Learned defence counsel and learned deputy opted to give their written submissions and that the ruling was to be made on 18 February 2000. However, after perusing the respective submissions of the parties I was in doubt on at least two main points, namely, on the applicability of s. 27 of the Evidence Act 1950 and the meaning of the term 'weight' under the Act. I therefore caused the date of making my ruling postponed to 26 February 2000 and requested further submissions from the parties on those points.

In submitting that there was no case for the accused to answer learned defence counsel raised the following points, namely:

(i) that it is for the prosecution to make a *prima facie* case against the accused at the close of the prosecution's case in that the prosecution must have adduced evidence (not inherently incredible) which, if the court were to accept it as accurate, would establish each essential element in the alleged offence. The case of *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645 was cited. And it was submitted that this requirement had not been met by the prosecution in this instant case for the following reasons:

(a) that the identity of the accused was not determined;

(b) that PW1 only took 4.09 grams of the crystal-like substance for analysis when the statutory minimum requirement for the operation of the presumption of trafficking under s. 37 (da)(xvi) is 50 grams;

(c) that there was possibility of the instrument used by PW1 being tainted as he was also doing other analysis and he only had one cleaner to do the cleaning;

(d) that there was no recording of observations during the analysis, only the result. Hence there is doubt on the accuracy of the result;

(e) that the evidence of PW3 contained contradictions and omissions such as the number of times he entered room No. 138. In his evidence PW3 said that he entered twice while in his police report he said that he only entered once;

(f) that the prosecution has failed to prove that the accused was in possession of 75.92 grams of methamphetamine;

(g) that there was a break in the chain of evidence in respect of the movement of the exhibit; and

(h) that the information obtained before the accused was cautioned and should be excluded being prejudicial to the accused; and

(i) that there is doubt as to the weight of the methamphetamine as found by PW1.

In reply learned deputy submitted that all that was required from the prosecution was to show a *prima facie* case against the accused for trafficking in that there was possession and that the drug found weighed 50 grams or more since s. 37(da)(xvi) of the Act provides a presumption to be invoked thereafter. And in this case learned deputy said that it should be inferred that the accused had

knowledge of the presence of the drug in question and was in custody and control of the same as it took him a while before opening the door of the room for the police to search, his reaction on the car key that was found in the room and that it was the accused who opened the car and took out the packet from under the floor mat of the front left seat.

It was also submitted that the drug found was a dangerous drug as defined in the Act and exceeded the 50 grams weight requirement. And it was contended that the weight as stated in the Act included calculated weight.

There is no dispute that at the end of the prosecution's case it is mandatory that the evidence adduced by the prosecution must have established a *prima facie* case before the defence can be called to answer the charge preferred. And the test of *prima facie* case has been interpreted to mean that at the end of the prosecution's case, 'on the assumption that the prosecution evidence was accurate, could the accused be lawfully convicted? The word 'accurate' could mean or should mean 'true' and the words 'prosecution evidence' could be said to refer to the evidence of 'primary facts' which could logically refer to evidence or evidence sufficient enough to prove each ingredient of an offence. Once there is sufficiency of such evidence, so long as it is not inherently incredible, a *prima facie* case is made out. Therefore, the test of a *prima facie* case would not entitle one to assess the veracity or credibility of evidence of witnesses.' (see: *Dalip Bhagwan Singh (supra)*; *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492; s. 180 of the Criminal Procedure Code).

And the ingredients of the offence as alleged in the charge preferred against the accused in the present case are as outlined by the learned deputy. Hence the first question to consider is whether the element of possession has been sufficiently established on *prima facie* scale based on the evidence adduced by the prosecution at the close of its case.

Having given the evidence adduced by the prosecution and my anxious consideration, I find the following to be disturbing, namely, the obvious discrepancies between the evidence of PW3 and PW4 on material points in relation to the issue of possession especially when these two were the crucial witnesses since both were involved in the search of Room No. 138 of Hotel Permai Sabah. Accordingly neither of the two testimonies of these witnesses can be relied upon without question. The nett effect of such evidence is that they have not managed to meet the requirement of the law as discussed above.

For instance, it was the evidence of PW3 that the key was with the accused as they were heading for the car whereas PW4 said that after finding the key he gave it to PW3 and only when they arrived at the car was the key given to the accused. And whilst PW3 initially said that the accused used the key to

open the car, when he was asked by the court he wavered and admitted that he did not actually see the accused using the key to open the car. And although PW4 testified that the accused used the key to open the car, he also admitted that at that time he was at the back. Hence was the car locked at that time? Serious doubt emerged.

PW3 seemed to be evasive on some vital information when compared to what was said by PW4. One instance is on the finding of the cash and the handphone during the first visit to the room. PW3 made no mention of them implying that they were not seen then as nothing was entered in the Search List (exh. P17). But PW4 said that these two items were on the bed when they first entered the room. Further PW3 was non-committal whether the accused was handcuffed at the lobby of the hotel whereas PW4 was certain that he was handcuffed. If that was the case how were the money, the handphone and the car keys handled by the accused as insisted by PW3? In view of what transpired could the testimonies of PW3 and PW4, the two important witnesses in the whole episode be relied upon even at the close of the prosecution's case? I was and still is very much in doubt. I do not think it would be fair to call the defence so as to clear these doubts when that should have been the task of the prosecution.

It was again the evidence of PW3 that it was the accused who took out the package found inside the car. PW4 on the other hand initially said that the accused pointed to the place inside the car where the package was kept. Later he said that it was the accused who took the item even while he was handcuffed. Nevertheless doubt remains in that how did the accused manage to pick up the item when he was handcuffed and at the same time he had in his hands the money and handphone? So did the accused pick up the package? The evidence adduced by the prosecution was blurred and again I did not think it should be the duty of the defence to clear such a doubt.

PW3 testified that he did not find the name as given to him over the telephone in the Guests' Register Book of the hotel but his suspicion was aroused by one peculiar name which made him decided to search Room No. 138. Now there was no doubt that such a name did not belong to the accused. Was there another person in the room? No hotel staff was called to clear this point. The prosecution seemed to be contented with the evidence of PW3 who said that he thought such a name was used only to impersonate or to mislead. But I would have thought that the person who supervised the entry of such a name into the Guests' Register Book would have been the best person to enlighten the court. Such a fact was crucial in that there was no dispute that no driving license was found in the person of the accused. The question that cast a serious doubt was: who drove the car? This point went deeper into mystery when PW7

confirmed that he never lent the car to the accused and that the last person driving it was a person by the name of 'Anthony'. There was no evidence adduced to clear this issue and I would think that it should have been done in view of the other missing evidence such as who drove the car and the name that was registered for the room.

It was obvious that the prosecution was depending on a few reactions of the accused during the whole episode to say that he must have the knowledge of the existence of the drug inside the car. Firstly the slow opening of the door of the room by the accused during the first visit by the raiding police party was taken as an indication of his knowledge. But then again it was the evidence of PW3 and PW4 that by the time they came to the hotel it was quite late, past 9.30pm. And PW4 even said that the accused was counting the money that was on the bed when they entered the room. Surely that itself should explain the delay. Secondly the alleged denial by the accused of the presence of the key inside the room during the second visit was also taken as indicating knowledge on the part of the accused. Yet it was never properly explained in the first place why the existence of the key was not recorded in the Search list (exh. P17). Surely the obvious step to take should have been to ask the accused for the key and the car after finding nothing inside the room during the first visit. More doubt arose when it was the evidence of PW3 that the accused was interrogated in the room during the second visit and nothing was said of him being arrested at that point in time. Thirdly it was submitted that it was the accused who picked up the package from inside the car. As discussed above, from the evidence of PW3 and PW4 grave doubt was cast as to whether indeed that was the case. And although at this stage it is not the function of the court to assess the credibility or veracity of the evidence of the witnesses in this instant case the crucial evidence so far adduced in certain important areas are in conflict leaving nothing to rely upon. Indeed it may be said that in such a circumstance the version so far is inherently incredible.

In respect of the drug exhibit itself the evidence adduced also cast doubt thereby failing to meet the *prima facie* test. Was the drug in possession of the accused? PW3 said that it was the accused who opened the envelope that was found under the floor mat and there were two packets containing white crystal-like substance and three roles of films found inside it. However PW4 testified that it was PW3 who opened the envelope. In addition PW4 said that he saw clearly only one packet taken from inside the envelope by PW3 who did not take it out completely before putting it back inside. Such evidence demolished any possibility that PW4 could have only seen part of the examination. Further doubt came about when PW9 said that he gave the drug exhibit to the Police Exhibit Store Keeper before taking it to the Chemist. Unfortunately for the prosecution no effort was made to call the Store Keeper to clarify on the

accessibility of the store by others. Neither was PW9 asked as to who took out the drug exhibit for him to bring to the Chemistry Department or whether the item was found in good order at that time. Although it is settled law that there is no necessity to call each and every person that might have handled an exhibit in this case the evidence of the Store Keeper would have been crucial in view of the evidence of PW9. All that was said by PW9 was that he gave the drug exhibit to the Store Keeper. What happened then to the exhibit is anyone's guess. The least that should have been done was to inquire from PW9 as to the condition of the exhibit when he took possession of it later on and as to the reliability of the Store. To make the matters worse the prosecution failed to offer the Store Keeper as a witness to the defence at the end of the prosecution's case.

The foregoing reasons are sufficient to rule that there is no case for the accused to answer at the end of the prosecution's case. However in the course of considering the case it also came to my attention what the chemist (PW1) said as to the determination of the weight of the drug methamphetamine. The weight was not based on the physical direct weight obtained by way of using a scale. Rather the weight was determined by way of calculation done by PW1 using a formula in that the percentage of methamphetamine as found using Gaschromatography (GC) was divided by the figure 100 and multiplied by the physical weight of the crystal-like substance. And the percentage was secured from the tests carried out on twelve samples that were randomly taken from the powdered crystal-like substance with the deduction for margin of error.

Now the term 'weight' as used in the Act is not defined. Learned counsel for the Accused submitted that it should be a physical weight and not a calculated weight. Learned deputy stated otherwise. My view is that the term 'weight' therein indicates a question of fact and not an assumption. And the role of a chemist called as an expert witness is only to assist the court on the technical aspects and it is for the court ultimately to determine or make such findings of facts from the results of the analysis by the chemist. As such it is not unusual for courts to reject findings of an expert witness. In this instant case PW1 did inform the court on how he obtained the purported weight of the methamphetamine as stated in the charge preferred against the accused. Unfortunately PW1 said nothing about the formula that he applied such as whether it has been the accepted formula to determine weight of drug such as methamphetamine. Moreover there was no indication that the crystal-like substance was uniformly homogenous whereby the twelve samples taken were true representatives of the substance. In fact PW1 never claimed that the machine used to grind the crystal-like substance could uniformly homogenise the material. Hence there was doubt whether the samples taken were from a uniformly homogenous material. And such an issue was crucial in view of the

formula that was used to calculate the purported weight of methamphetamine in this case. There was always a possibility that the samples might have more percentage of methamphetamine than the rest of the material in which case the weight obtained by PW1 would then be incorrect.

Accordingly I was also left with serious doubt as to the purported weight of methamphetamine stated in the charge preferred against the accused and I do not think the prosecution managed to establish on *prima facie* basis that indeed the weight given therein was correct.

The other point that went against the prosecution was on the amount of samples taken. There was no doubt that PW1 did not take 50 grams or more for analysis. And that was not consistent with the views expressed by the courts in earlier cases. For instance in the case of *Public Prosecutor v. Alex bin Muharram and Adzman bin Muadjin* (Criminal Trial No. K 47-02 and 03 of 1999 unreported) Charles Ho J said this:

> It would appear that in the above-mentioned cases, their Lordships were of the unanimous opinion: (a) in order to raise the presumption of trafficking under section 37 (da) of the Act it must be conclusively established that the Appellants were in possession of the statutory minimum of 200 g of cannabis; (b) to determine the statutory minimum the Chemist must actually carry out tests on 200 g or more of the cannabis and not by means of representative samples of less than 200 g. It would follow, therefore, from those decisions of the Supreme Court and High Courts that for example, in the case of the drugs methamphetamine 50 g or more must be tested in order to satisfy the adequate quantity test and to raise the statutory presumption. It is, however, contended by the learned Deputy Public Prosecutor that *Leong Bon Huat*'s case and the decisions of the cases in the High courts cited by the defence only applied to cannabis because the method used in analysing cannabis was different from the method used for analysing methamphetamine. The main difference, according to the learned Deputy Public Prosecutor is that cannabis cannot be homogenised but in the case of methamphetamine it can be done. Therefore he says that it is possible in methamphetamine to take representative samples at random for testing in order to determine what the total weight of the drugs in the whole of the substance tested. Upon careful reading of those decisions I do not think, with respect, that any distinctions could be drawn between cannabis and other dangerous drugs as far as the methods of analysing or testing are concerned.

I have no reason to disagree with the above view.

There is also the decision of the Court of Appeal in the case of *Loo Kia Meng v. Public Prosecutor* [2000] 3 CLJ 653 CA where Shaik Daud JCA at pp. 657-658 said this:

> Now under s. 37(j) of the Act, the chemist is required to take a minimum of 10% from the receptacle in which the drug was found. The chemist merely said he took 20 random samples but nowhere has he said in his evidence that this 20 random samples represented at least 10% of the dried plant material. For all we know the 20 random samples may be more, or for that matter, may be less than 10%. It is incumbent upon the chemist to take a minimum of 10% by virtue of s. 37(j) of the Act. We find that when he said he took 20 random samples, it is ambiguous as the 20 samples could be more or less than 10%. The learned DPP submitted that the 20 samples taken by the chemist represented a fair sample of the total. With respect, we are unable to agree with that submission because the 20 samples could well be much less than the 10% required to be taken. We hold that pursuant to s. 37(j) of the Act, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section.
>
> In this respect, we refer to the case of *Leong Bon Huat v. PP* [1993] 3 CLJ 603 where it was in the evidence of the chemist that the total weight of samples taken for analysis was 'more than 10%' of the net weight of the material.

Again in the present case there was no evidence that such a requirement was complied with. This was another weakness of this case.

Of course it should not mean that the foregoing would absolve the accused from a charge of being in possession of a dangerous drug and I was minded to take that course but for my earlier findings hereinabove.

For the above reasons, I ruled that the prosecution had failed to establish a *prima facie* case and thus I acquitted him on the charge preferred against him.